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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KAARE GILBOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the electronic transfer of funds is encompassed within 18 U.S.C. 2314, and whether the Circuit Court's holding that it is within the statute constitutes ex post facto legislation in violation of Article I Section 9 Clause 3 of the United States Constitution and a denial of due process in violation of the Fifth Amendment to the United States Constitution?

2. Whether 18 U.S.C. 3238 mandates the trial of a defendant in the state where he is arrested when the offenses were begun outside the jurisdiction of any

particular State or district, and whether the Circuit Court's conclusion to the contrary is in conflict with the plain wording of the statute and with the rulings in the First, Fifth and Ninth Circuits?

3. Whether the admission into evidence of an unrelated occurrence committed two years prior to the acts charged violates the Federal Rules of Evidence?

4. Whether the District Court had jurisdiction over the acts of a foreign national committed outside this country particularly where there is no extraterritorial provisions in the statutes under which he is charged, and whether the Circuit Court's holding that there was jurisdiction is in direct conflict with the Fifth Circuit's holding in *United States v. Columba-Collela*?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinion in the Court Below	1
Grounds for Jurisdiction of this Court	2
Constitutional Provisions Involved	2
Statement of Facts	2
Argument:	
POINT I— The Electronic Transfer of Funds is not Encompassed within 18 U.S.C. 2314, and the Circuit Court's Holding to the Contrary Constitutes Ex Post Facto Legislation in Violation of Article I, Section 9, Clause 3 of the United States Constitution and a Denial of Due Process in Violation of the Fifth Amendment to the United States Constitution	6
POINT II— 18 U.S.C. 3238 Mandates the Trial of a Defendant in the State Where he is Arrested When the Offenses Were Begun Outside the Jurisdiction of any Particular State or District, and the Circuit Court's Conclusion to the Contrary is in Conflict with the Plain Wording of the Statute and With Rulings in the First, Fifth and Ninth Circuits	13

POINT III—
The Admission Into Evidence of an Unrelated Occurrence Committed Two Years Prior to the Acts Charged Violated the Federal Rules of Evidence 17

POINT IV—
The District Court did not Have Jurisdiction Over the Acts of the Defendant, a Foreign National, Committed Outside this Country Particularly Where There is no Extraterritorial Provisions in the Statutes Under Which he is Charged, and the Circuit Court's Holding that there Was Jurisdiction is in Direct Conflict with the Fifth Circuit's Holding in *United States v. Columba-Colella* 21

Conclusion 30

Appendix A—Opinion of the Second Circuit ... 1a

Appendix B—Excerpts from the Constitution of the United States 9a

Appendix C—Statutory Provisions Involved .. 10a

TABLE OF CASES

	Page
Beam v. United States, 338 F.2d 763, 768 (5th Cir. 1964)	7
Best v. United States, 184 F.2d 131 (1st Cir. 1950)	16
Chandler v. United States, 171 F.2d 921, 932-933 (1st Cir. 1948)	16
Charon v. United States, 412 F.2d 657 (9th Cir. 1969)	22
Cook v. United States, 288 U.S. 102 (1933)	22
Krichman v. United States, 256 U.S. 363, 367-368 (1921)	9
Merrill v. United States, 338 F.2d 763, 768, 770 (4th Cir. 1964)	6
Murray v. The Schooner Charming Betsey, 6 U.S. (2 Cranch) 64, 118 (1804)	22
Pereira v. United States, 347 U.S. 1, 9 (1953)	11
Prussian v. United States, 282 U.S. 675, 677 (1931)	9
Rivard v. United States, 375 F.2d 882 (5th Cir. 1967)	22
Rocha v. United States, 288 F.2d 545 (9th Cir. 1961)	22
Strassheim v. Daily, 221 U.S. 280 (1911)	25
Streett v. United States, 331 F.2d 151 (8th Cir. 1964)	8
The Paquete Habana, 175 U.S. 677, 700 (1900)	21
United States v. Adielizzo, 77 F.2d 841, 844 (2d Cir. 1935)	9
United States v. Barnett, 258 F. Supp. 455 (M.D. Tenn. 1965)	9
United States v. Beliard, 618 F.2d 886, 887 (1st Cir. 1980)	15

United States v. Bowman , 260 U.S. 94 (1922) 22
United States v. Brothman, 191 F.2d 70 (2d Cir. 1951) 17
United States v. Browne, 225 F.2d 751, 755 (7th Cir. 1955) 17
United States v. Castillo-Felix, 539 F.2d 9, 13 (9th Cir. 1976) 15
United States v. Columbo-Colella, 604 F.2d 356 (5th Cir. 1979) 21
United States v. Daniszewski, 380 F. Supp. 113 (E.D.N.Y. 1974) 26
United States v. Davis, 608 F.2d 555 (5th Cir. 1979) 22
United States v. De Vaugn, 579 F.2d 225 (2d Cir. 1978) 19
United States v. Dunlop, 573 F.2d 1092, 1094 (9th Cir. 1978) 7
United States v. Egan, 501 F. Supp. 1252 (S.D.N.Y. 1980) 22
United States v. Erwin, 602 F.2d 1183 (5th Cir. 1979) 16
United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974) 26
United States v. Figueroa, 618 F.2d 934, 939 (2d Cir. 1980) 18
United States v. Fordyce, 192 F. Supp. 93 (S.D. Cal. 1961) 9
United States v. Gubelman, 571 F.2d 1252, 1255 (2d Cir. 1978) 18
United States v. Jackson, 576 F.2d 749, 755-756 (8th Cir. 1977) 7
United States v. James-Robinson, 515 F. Supp. 1340, 1342-1343 (S.D. Fla. 1981) 21
United States v. Johnson, 323 U.S. 273 (1944) .. 17
United States v. Jones, 450 F.2d 523, 524 (5th Cir. 1971) 7

United States v. Jones, 174 F.2d 746 (7th Cir. 1949) 17
United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979) 19
United States v. Mohel, 604 F.2d 748 (2d Cir. 1979) 19
United States v. O'Conner, 580 F.2d 38 (2d Cir. 1978) 19
United States v. Pizzarusso, 388 F.2d 8, 10-11 (2d Cir. 1968) 23
United States v. Provoo, 215 F.2d 531, 537 (2d Cir. 1954) 17
United States v. Sindona, 636 F.2d 792 (2d Cir. 1980) 28
United States v. Speidel, 562 F.2d 1129, 1131 (8th Cir. 1977) 8
United States v. Williams, 589 F.2d 210, 212-213 (5th Cir. 1979) *adopted in relevant part*, 617 F.2d 1063 (5th Cir. 1980) (*en banc*) 16
United States v. Wiltberger, 5 Wheat. 76, 95-96 (1820) 12
United States v. Winter, 509 F.2d 975 (5th Cir. 1975) 22
United States v. Young, 210 F. Supp. 640, 642 (W.D. Mo. 1962) 7
Williams v. United States, 192 F. Supp. 97 (S.D. Cal. 1961) 9
Zenith Radio Corp. v. Matsushita Electric Industrial Co., 494 F. Supp. 1161, 1178-79 (E.D. Pa. 1980) 21

OTHER AUTHORITIES

	Page
15 U.S.C. 1693 ("Electronic Fund Transfers")	2
18 U.S.C. 10	2
18 U.S.C. 478	2
18 U.S.C. 488	2
18 U.S.C. 489	2
18 U.S.C. 1343	2
18 U.S.C. 2311	2
18 U.S.C. 2314	2
18 U.S.C. 3236	2
18 U.S.C. 3237(a)	2
18 U.S.C. 3238	2
21 U.S.C. 955a	2
47 U.S.C. 153(f)	2
United States Constitution, Article I, Section 9, Clause 3	2
Artricle III, Section 2, Clause 3	2
Amendment V	2
Federal Rules of Evidence, Rule 404(b)	18
1956 U.S. Code Cong. and Adm. News, pp. 3036-3039	8
1961 U.S. Code Cong. and Adm. News, pp. 3264-3266	22
1968 U.S. Code Cong. and Adm. News, pp. 3654-3657	8
Halisbury's Laws of England, par. 74, "Extra-territorial Jurisdiction"	22
Harvard Research In International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int'l. Law Spec. Supp. 435, 445 (1935)	23
H.R. Rep. No. 323, 96th Cong. 1st Sess. 16 (1979)	26

Oppenheim, International Law, sec. 147 (3rd ed. 1920) 22
Restatement (Second), Foreign Relations Law, Sections 3(3), 18, 145 (i) 22
Richardson on Evidence (10th ed.) Section 179. 22

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OPINION IN THE COURT BELOW

The decision of the United States Court of Appeals for the Second Circuit, which gives the reasons for the affirmance of the judgment of conviction, is set forth in the Appendix at page 1a.

GROUNDS FOR JURISDICTION OF THIS COURT

Judgment of conviction was entered in the United States District Court for the Southern District of New York on December 11, 1982. The order of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction was entered on July 23, 1982 and the order of said Court denying the petition for rehearing was entered on August 24, 1982. This Court has jurisdiction to review the judgment of the Circuit Court by Writ of Certiorari pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article I, Section 9, Clause 3, Article III, Section 2, Clause 3, and Amendment V of the United States Constitution. These are set forth in the Appendix at pp. ???

STATUTORY PROVISIONS INVOLVED

This case involves 15 U.S.C. 1693; 18 U.S.C. 10; 18 U.S.C. 478; 18 U.S.C. 488; 18 U.S.C. 489; 18 U.S.C. 1343; 18 U.S.C. 2311; 18 U.S.C. 2314; 18 U.S.C. 3236; 18 U.S.C. 3237(a); 18 U.S.C. 3238; 21 U.S.C. 955a and 47 U.S.C. 153(f). These are set forth in the Appendix at pp. 10a-26a.

STATEMENT OF FACTS

This appeal raises for consideration the bases for the exercise of jurisdiction and venue over the extraterritorial acts of foreign nationals as well as the interpretation of several statutes. These issues arise from an alleged swindle in the ship brokerage in-

dustry. The Government has charged the petitioner Kaare Gilboe, Jr. with the crimes of fraud by wire in violation of 18 U.S.C. §1343 and transportation of stolen property in violation of 18 U.S.C. §2314.

An understanding of the facts of this case will be facilitated by defining certain terms commonly used in the ship brokerage industry, to wit:

1. A "ship broker" locates and arranges for the transportation of certain cargo on certain ships. A broker performs these services for a commission.

2. A "fixture" is an informal contract (often oral) between brokers providing for the transportation of certain cargo on leased ships.

3. A "charter party" is a written contract encompassing and, more particularly, setting forth the exact terms of the fixture.

4. "Freight" is the money paid for the transportation of the cargo. The money is normally paid to the ship broker who deducts his commission and forwards the balance to the ship owner.

5. "Tonnage" refers to cargo ships.

As to counts one and two of the indictment, the facts, in brief, are as follows:

Kaare Gilboe, Jr., a Norwegian citizen (residing at all relevant times outside the United States) was a ship broker. During the years 1978 and 1979 Mr. Gilboe was employed by the firm of Bundo Lines, Ltd., a Hong Kong based ship brokerage corporation.

In November, 1978, the government of the People's Republic of China wished to have grain that it had purchased in Argentina transported from Argentina to China. Bundo Lines acted as the broker for the Chinese government to secure ships for the transportation of the grain. In this capacity, it began to make inquiries in Hong Kong about available ships. Eventually, Libra Shipping, a Panamanian ship brokerage corporation with an office in Manhattan, responded

that it had suitable tonnage. A proposal was then made through Moller Steamship, a Norwegian corporation with offices in Hong Kong, to Libra for the use of their tonnage. A fixture was concluded and a charter party entered into in which Libra Shipping substituted Librand Shipping, Ltd., a British corporation for itself. This was done to avoid being subject to United States law, particularly the tax laws.

The ship provided by Librand for the transportation of the grain was the Kanishka, an Indian owned vessel of foreign registry. On January 26, 1979, the Kanishka, fully loaded with the grain, set sail for China. On February 3, 1979, the Chinese government wired the freight to the Bundo Lines' account in the Hong Lung Bank in Hong Kong. This money was then forwarded to Barclays Bank International, Ltd., New York for the credit of the account of Commonwealth Brokers, Ltd. in the Barclays Bank International, Ltd., Nassau, The Bahamas (Barclays New York acting only as transferee). The money was never sent to Librand Shipping or to the shipowners. As a result, the Chinese government was forced to pay the freight for the Kanishka directly to the shipowners, thereby paying the freight for that ship twice.

As to counts three through eight of the indictment, the Government alleges the following:

In 1980 Mr. Kaare Gilboe had relocated to Tokyo. With the consent of the manager of Tokyo Chartering, a ship brokerage corporation, he was allowed to use said corporation as a Telex and mailing address.

Howard Holder, Ltd., a London ship brokerage firm, was contacted by Mr. Gilboe and told that Gilboe had three ships available and that these ships were supposedly owned by Maritime Brokers, Ltd., which in turn was owned and controlled by Mr. Eddie Hsu. Howard Holder then contacted Clarkson's, another London ship brokerage firm, which had

Chinese grain in the United States Gulb that had to be transported to China. Clarkson's contacted the Chinese government and it agreed to have the Maritime Brokerage ships transport its cargo. Fixtures were concluded for three ships and charter parties followed. The three ships were named: The Oinoussian Superiority (Greek ownership); The Jaget Vijeta (Indian ownership); the Asian Adventures (Danish ownership). All of the above vessels were not registered in the United States.

In August the ships took on their cargoes and set sail for China. On August 26, 1980 the Chinese wired the freight to the New York branch of the Royal Bank and Trust Company, a Canadian bank, which then wired it to the account of Maritime Brokers, Ltd., in the First Cayman Trust Company, the Cayman Islands. The New York bank acted only as a transferee of the money.

The freight was never forwarded to Howard Holder, Clarkson's or the shipowners. It was later revealed that Eddie Hsu did not own the ships. Once again, the Chinese government was forced to pay the freight directly to the shipowners, thereby paying the freight twice.

Investigations of both of the above mentioned incidents took place in Hong Kong and Tokyo. Both investigations concluded that there was insufficient evidence to bring an indictment.

In August of 1981, approximately one year after the last incident is alleged to have occurred, Mr. Gilboe was arrested while in this country. He was arrested in Connecticut and brought to the Southern District of New York for trial. Following a seven day jury trial with the Honorable Richard Owne, District Judge, Kaare Gilboe was found guilty of all eight counts charged in the indictment. He was sentenced to the maximum on each count with sentences for the

first incident running concurrently and the sentences for the second incident running concurrently but the two incidents to run consecutively. Mr. Gilboe is presently incarcerated serving this twenty year sentence.

By a decision dated July 23, 1982 and entered on July 23, 1982 the United States Court of Appeals for the Second Circuit affirmed defendant's conviction in its entirety. Defendant's petition for rehearing was also denied in its entirety on August 24, 1982.

ARGUMENT

POINT I

THE ELECTRONIC TRANSFER OF FUNDS IS NOT ENCOMPASSED WITHIN 18 U.S.C. 2314, AND THE CIRCUIT COURT'S HOLDING TO THE CONTRARY CONSTITUTES EX POST FACTO LEGISLATION IN VIOLATION OF ARTICLE I SECTION 9 CLAUSE 3 OF THE UNITED STATES CONSTITUTION AND A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In upholding defendant's conviction under 18 U.S.C. 2314, the Circuit Court engaged in ex post facto legislation by improperly expanding §2314 to cover acts completely without the scope of said statute. The Circuit Court stated that whether §2314 covers the electronic transfer of funds is a question of first impression. However, the only way this can be considered a question of first impression is to ignore all the decisions which have held that §2314 is specific and inclusive and must be interpreted strictly within the confines of the items stated (see, e.g., *Merrill v.*

United States, 338 F.2d 763, 768 [5th Cir. 1964]; *Beam v. United States*, 364 F.2d 756, 759 [6th Cir. 1966]; *United States v. Jones*, 450 F.2d 523, 524 [5th Cir. 1971]; *United States v. Dunlop*, 573 F.2d 1092, 1094 [9th Cir. 1978]; *United States v. Jackson*, 576 F.2d 749, 755-756 [8th Cir. 1977]; *United States v. Young*, 210 F.Supp. 640, 642 [W.D.Mo. 1962]).

Section 2314 of title 18 provides in pertinent part as follows:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . .

Section 2311, the definitions section for the above statute, defines "money" and "securities" as follows:

> "Money" means the legal tender of the United States or of any foreign country, or any counterfeit thereof;
>
> "Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged,

counterfeited, or spurious representation of any of the foregoing.

This statute, as can readily be observed, is quite detailed and inclusive as to which items and what conduct fall within it. All of these items (over 20 specified) are "tangible" and the statute by its own terms requires that they be physically transported and does not include the electronic crediting and debiting of accounts. The legislative history of the statute also reveals that it does not, and was not intended to cover such electronic transfers (see Act July 9, 1956, 1956 U.S. Code Cong. and Adm. News, pp. 3036-3039; Pub. L. 87-371, 1961 U.S. Code Cong. and Adm. News, pp. 3264-3266; Pub. L. 90-535, 1968 U.S. Code Cong. and Adm. News, pp. 3654-3657). This legislative history reveals that Congress was very specific in delineating what items it wished to come within the purview of 18 U.S.C. Section 2314.

Despite varying viewpoints by numerous courts as to which documents fall within the boundaries of §2314, all of the cases involved documents. This has remained true even with the change in the wording of §2311 from "securities means" to "securities include", a change that some urged broadened the scope of the statute (see, *United States v. Speidel*, 562 F.2d 1129, 1131 [8th Cir. 1977]). Even then, the courts have held that certain documents still remain outside the scope of §2314 (see, e.g., *Streett v. United States*, 331 F.2d 151 [8th Cir. 1964]) wherein the Court held that traveler's checks with forged signatures were not included within the statute; *Merrill v. United States*, *supra*, 338 F.2d 763, credit card not included within §2314; *United States v. Jones*, *supra*, 450 F.2d 523, 524, §2314 does not include forged airline tickets; *United States v. Dunlop*, *supra*, 573 F.2d 1092, department store script held not to be within the scope of §2314).

While it is undoubtedly true that times change and with them our technology and habits, it frequently happens that the law as written does not cover abuses associated with these changes. A prime example of this as relates to §2314 was the proliferation of credit card use in the late 1950s. Despite numerous attempts to have stolen credit cards or charge slips included within §2314, the courts have repeatedly held that the statute as written simply does not cover them (see, e.g., *Merrill v. United States, supra*, 338 F.2d 763; *Beam v. United States, supra*, 364 F.2d 756; *United States v. Fordyce*, 192 F.Supp. 93 [S.D. Cal. 1961]; *Williams v. United States*, 192 F.Supp. 97 [S.D. Cal. 1961]; *United States v. Young, supra*, 210 F.Supp. 640; *United States v. Barnett*, 258 F.Supp. 455 [M.D. Tenn. 1965]).

The refusal to include certain documents within §2314 has been based on the time honored principle that criminal statutes must be strictly construed. In this regard it has been held:

> "Section 2314 is a criminal statute ' . . . which must be strictly construed.' *Prussian v. United States* (1931), 282 U.S. 675, 677, 51 S.Ct. 223, 75 L.Ed. 610. From the government's standpoint the most that can be said is that the meaning of the statute is not to be resolved by an interpretation 'to embrace offenses not clearly within the law.' *Krichman v. United States* (1921), 256 U.S. 363, 367-368; 41 S.Ct. 514, 516, 65 L.Ed. 992 (1921). *Any doubt must be resolved against broadening its scope. United States v. Adielizzo*, (2d Cir., 1935), 77 F.2d 841, 844." (*Merrill v. United States, supra*, 338 F.2d at 770; see also, *United States v. Dunlop, supra*, 573 F.2d at 1094). (emphasis supplied)

Rather than violate this fundamental principle of our democratic form of government, the courts in the past

have left it to the legislative branch to legislate. Preservation of this principle is crucial as it embodies the constitutional mandate of due process contained in the Fifth Amendment to the United States Constitution and the proscription of ex post facto legislation found in Article I Section 9 Clause 3 of the Constitution. Indeed, when Congress has seen criminal conduct falling outside the scope of §2314 they have amended the statute (e.g., in 1968 Congress amended §2314 to include traveler's checks bearing forged countersignatures within its scope. These had previously been held to be beyond the wording of the statute in *Streett v. United States, supra,* 331 F.2d 151).

When the modernization of commercial habits is so great however, as in the case of the electronic transfer of funds, a mere amendment of the statute is not enough. To cover abuses in this area, Congress was required to enact in 1978 a separate statutory scheme entitled "Electronic Fund Transfers" (15 U.S.C. §1693 et seq.). Congress saw the need to enact this new statute even though §2314 was on the books in one form or another for more than 40 years. Obviously, Congress would not have endeavored to enact a separate statute if §2314 did in fact cover the electronic transfer of funds.

In his brief before the Second Circuit, the U.S. Attorney stated (on p. 22) that "Wire transfers between banks are simply the modern means of transferring money", a position which the Circuit Court adopted. While this observation is true, it does not mean that §2314 can now be construed as covering these transfers. Instead, it merely underlines the reason for enactment of 15 U.S.C. §1693.

The Circuit Court and the U.S. Attorney's office, in advocating reconstruction of §2314 to cover the crime charged, have jeopardized the principle of strict

construction merely because of their ignorance of the laws which they are sworn to uphold. This is not a question of letting Mr. Gilboe's acts go uncharged and unprosecuted, if he did in fact violate a statute, but a question as to the proper manner which the legislature chose to regulate such conduct. The Second Circuit's position compounds the crime with which Kaare Gilboe is charged by adding the theft of the civil rights of 200 million Americans to his alleged theft of $5 million.

In its decision, the Circuit Court bases jurisdiction under 18 U.S.C. §1343 and the violation of §2314 on the same act which is the wiring of the funds to the Bahamas through a New York bank, *Pereira v. United States* (347 U.S. 1, 9 [1953]) however, requires that sections 1343 and 2314 each be supported by an independent basis, i.e., proof of a fact not essential to the other.

The statute begins with the words, "Whoever transports in interstate or foreign commerce". Clearly, the acts sought to be proscribed must involve the transportation in interstate or foreign commerce. However, the Circuit Court in its decision seems once again to add to the plain wording of the statute by speaking of "international transactions". Foreign commerce has a specific meaning, i.e., the transportation between the United States and another country (see 18 U.S.C. section 10; 47 U.S.C. section 153 [f]). By speaking in terms of international commerce the Court has broadened the scope of the staute so as to attempt to include the activities charged to Mr. Gilboe. The statute as written does not encompass those activities.

Finally, the dangers of the Circuit Court's decision can be most readily understood when considering the following principles enunciated by Chief Justice

Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 95-96, 5 L.Ed. 37:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. * * * The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

POINT II

18 U.S.C. 3238 MANDATES THE TRIAL OF A DEFENDANT IN THE STATE WHERE HE IS ARRESTED WHEN THE OFFENSES WERE BEGUN OUTSIDE THE JURISDICTION OF ANY PARTICULAR STATE OR DISTRICT, AND THE CIRCUIT COURT'S CONCLUSION TO THE CONTRARY IS IN CONFLICT WITH THE PLAIN WORDING OF THE STATUTE AND WITH RULINGS IN THE FIRST, FIFTH AND NINTH CIRCUITS.

In its decision, the Second Circuit held that §3238 was not applicable to the facts of the case. This statute in its entirety provides:

> §3238. Offenses not committed in any district
>
> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

The Circuit Court held instead that this case is governed by §3237(a) which states:

> §3237. Offenses begun in one district and completed in another
>
> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another,

> or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

The Circuit Court stated that §3238 "applies only to offenses 'not committed in any district,' as its title indicates." (It is interesting to note that the Circuit Court failed to include in its decision or to consider the title of §3237 which is, "Offenses begun in one district and completed in another". Surely if titles to statutes are to govern, §3237 is totally inapplicable to this case unless Hong Kong and Japan are now districts in the United States.) The Court, contrary to accepted principles of statutory construction, failed to consider the language of the statute itself rather than just its title. In looking at the actual language of §3238, it is apparent that this statute explicitly governs those situations where the offenses were *begun* outside the jurisdiction of any particular State or district. The Circuit Court could only reach its conclusion by completely ignoring the first seven words of §3238 as well as the fact that "begun or committed" are in the disjunctive. Once it is established that the offenses charged were begun outside any state or district then §3238 applies even if those offenses continued within a state or district. To construe §3238 as applying only to offenses committed completely outside of any state or district is to render the first seven words of this statute, and in particular the word "begun", meaningless. The First and Ninth Circuit Courts of Appeals have not considered the word "begun" to be mean-

ingless as they have applied §3238 in cases where offenses were begun outside the country and continued inside this country (*United States v. Castillo-Felix*, 539 F.2d 9 [9th Cir. 1976]; *United States v. Beliard*, 618 F.2d 886 [1st Cir. 1980]).

It must also be remembered that §3238 was amended in 1948 to include the words "begun or". The purpose of this amendment was to clarify the statute's scope (see, 18 U.S.C.A. §3238, "Reviser's Note"). If the statute was meant only to cover offenses committed completely outside this country, such an amendment was unnecessary since §3238 prior to the amendment already covered those situations. The amendment to §3238 was designed to make clear that §3238 fixes the locus of those crimes not complete either inside or outside this country. This manner of fixing the locus of a crime is also done by another venue statute, 18 U.S.C. §3236, for the crimes of murder or manslaughter. Furthermore, §3237(a) also contemplates the situation where a crime is not complete in any one place by its use of the words "any offense against the United States *begun in one district and completed in another*". (emphasis supplied). Clearly Congress understands the plain meaning of the word "begun" and uses it only when it will enforce their legislative purpose.

Under all versions of the facts in this case, the offenses charged to the defendant were begun outside the jurisdiction of any particular state or district of the United States. Counts one and two of the indictment were begun in Hong Kong, while counts three through eight were begun in Tokyo. Mr. Gilboe was arrested in Connecticut.

Article III Section 2 Clause 3 of the United States Constitution provides in pertinent part that "The trial of all crimes . . . shall be held in the State where said

crimes shall have been committed; *but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed*" (emphasis supplied).

Here, Congress by 18 U.S.C. Section 3238 did specifically provide where such trials should take place. In this case, that place can only be in the District of Connecticut. Moreover, the fact that one or more of the acts charged to Mr. Gilboe may have been committed in this country does not remove this case from the ambit of §3238 (*United States v. Williams*, 589 F.2d 210, 212-213 [5th Cir. 1979], *adopted in relevant part*, 617 F.2d 1063 [5th Cir. 1980] [*en banc*]; *United States v. Erwin*, 602 F.2d 1183 [5th Cir. 1979]).

While to some the placing of venue in Connecticut—a state with no apparent relation to the crimes in question—may seem arbitrary, this is precisely the intention of §3238. This statute deals only with crimes against the United States which were begun or committed outside the United States, thereby making their ties to any particular state tenuous. Consequently, rather than having various states squabbling over which one is to try the case, Congress arbitrarily fixed venue by statute. In applying §3238, it was held that venue for the trial of a United States citizen charged with having committed treason against the United States while in Germany was in Massachusetts, the state where the plane bringing the defendant to this country was forced down by mechanical problems, and not in Washington, D.C. where he was under indictment (*Chandler v. United States*, 171 F.2d 921, 932-933 [1st Cir. 1948]; see also, *Best v. United States*, 184 F.2d 131 [st Cir. 1950]). Similarly, 21 U.S.C. §955a subdivision (f) fixes venue for the violation of §955a ("Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels") in "the United States district court at

the point of entry where that person enters the United States, or in the United States District Court for the District of Columbia" and not in the district where the controlled substances were manufactured, distributed or possessed. Again, Congress has arbitrarily fixed venue in a state or district which does not necessarily have a relation to the crime.

It should be observed at this point that venue of this action was totally in the control of the U.S. Attorney. He was the one who had the power to arbitrarily determine where Mr. Gilboe would be tried by having him arrested in Connecticut. His ignorance of the venue statute should not now permit him to escape the consequences of that decision.

Finally, venue is not a matter to be taken lightly and considered inconsequential. "In a criminal trial in the federal courts venue must be proved, in the absence of waiver, like any other materials allegation of the indictment, *U.S. v. Johnson*, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236; *U.S. v. Brothman*, 2 Cir., 191 F.2d 70; *U.S. v. Jones*, 7 Cir., 174 F.2d 746" (*U.S. v. Provoo*, 215 F.2d 531, 537 [2d Cir.]; *U.S. v. Browne*, 225 F.2d 751, 755 [7th Cir.]).

POINT III

THE ADMISSION INTO EVIDENCE OF AN UNRELATED OCCURRENCE COMMITTED TWO YEARS PRIOR TO THE ACTS CHARGED VIOLATED THE FEDERAL RULES OF EVIDENCE.

As part of its case the Government introduced into evidence acts allegedly committed by the defendant which it maintained were part of a common scheme or plan. This included testimony about Mr. Gilboe's involvement in the chartering of two other ships—the Costanza M and the Aiolos—at the same time as the

chartering of the Kanishka. Also admitted in evidence as part of the Government's case in chief was testimony concerning an allegedly similar scheme which took place in the Philippines approximately two years before any of the transactions of the indictment.

A common scheme or plan is one so related in character, time and place of commission as to tend to support the conclusion that there was a plan or system which embraced both them and the crime which is charged (see *United States v. Gubelman*, 571 F.2d 1252, 1255 [2d Cir.]).

There is no doubt that the 1977 Philippines incident does not fall within the definitional framework of common scheme or plan as enunciated by any appellate court to date. The Phillippines incident involved a different brokerage firm, different victims and took place almost two years before the transactions alleged in the indictment. Clearly this was not in any way related to the actions charged in the indictment. Its admission violates Rule 404(b) of the Federal Rules of Evidence, as it could merely show a criminal disposition on the part of the defendant and only result in prejudice. Although one could argue that such evidence was probative of the defendant's knowledge and intent, this was not admitted as such evidence, as shown by the fact that it was introduced as part of the Government's case in chief. The Government in moving for the admission of this evidence stated the following in its memorandum of law:

> As noted above, the Government submits that since the similar evidence is relevant to common scheme or plan, it is admissible as part of the Government's case in chief. *United States v Figueroa, supra*, 618 F.2d at 939. If, however, the Court determines that it is not relevant to common plan, but only to knowledge and intent, then the proper procedure is for the Government to rest its case, reserving the right to reopen if

there is no defense case, and then to present the similar act proof in rebuttal or after reopening. *United States v. Figueroa, supra*, 618 F.2d at 939, n. 1.

Admission of this evidence during the case in chief was not a minor procedural defect. Rather, awaiting the conclusion of the defendant's case before ruling on its admissibility, "enables the trial judge to determine whether the issue sought to be proved by the evidence is really in dispute and if so, to assess the probative worth of the evidence on this issue against its prejudicial effect" (*United States v. Figueroa*, 618 F.2d 934, 939 [2d Cir.]).

In this case there was no such assessment. By improperly admitting the evidence of the Philippines transaction as part of a common scheme or plan, the trial court permitted this highly prejudicial testimony into evidence without determining whether the issue sought to be proved was really in dispute and, more importantly, whether its probative value outweighed its prejudicial effect. Since this testimony was not of a common scheme or plan, the trial court had absolutely no discretion to admit it as part of the Government's case in chief. Moreover, the improper introduction of this testimony into evidence should not be taken lightly. As stated in *United States v. Figueroa*, p. 939 *supra*:

> Despite the frequency with which these principles have been expressed and the reversals that have occurred when they have not been followed, *United States v. Mohel, supra; United States v. Manafzadeh, supra; United States v. O'Conner, supra; United States v. DeVaugn, supra*, the Government persists in jeopardizing convictions by offering evidence of similar crimes or acts either in disregard of the standards or without assisting the trial judge to make sure that they are correctly applied.

An even more prejudicial and harmful error occurred when the trial court admitted into evidence testimony concerning the Costanza M and the Aiolos. Although they may be considered part of a common scheme or plan, testimony concerning them could only be admissible if relevant to an issue in dispute (*United States v. Figueroa, supra*, 618 F.2d at 939). At the time the trial court admitted testimony concerning the Contanza M and the Aiolos into evidence the issue of identity and the commission of the act were not in dispute, nor did they arise at any time during the trial. While the Government and the trial court anticipated that knowledge and intent would be in dispute it is axiomatic, as the Government itself has stated, that such evidence must await conclusion of the defendant's case (*United States v. Figueroa, supra*, 618 F.2d at 939). Admission of this testimony at the beginning of the Government's case had the effect of coloring all subsequent testimony heard by the jury.

How many times must the appellate courts reiterate the proper procedure for the admission of evidence of common scheme or plan before the trial courts comply? Surely, the trial courts will permit such testimony only as long as they are secure in the belief that the appellate courts will somehow characterize the admission of this obviously prejudicial testimony as less than reversible error. It is indeed surprising that the Second Circuit which in the past so eloquently warned against improperly admitting similar act evidence chose in this case to not even discuss admission of this evidence.

POINT IV

THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER THE ACTS OF THE DEFENDANT, A FOREIGN NATIONAL, COMMITTED OUTSIDE THIS COUNTRY PARTICULARLY WHERE THERE IS NO EXTRATERRITORIAL PROVISIONS IN THE STATUTES UNDER WHICH HE IS CHARGED AND THE CIRCUIT COURT'S HOLDING THAT THERE WAS JURISDICTION IS IN DIRECT CONFLICT WITH THE FIFTH CIRCUIT'S HOLDING IN *UNITED STATES V. COLUMBA-COLELLA*.

There has never been a case in which a nonresident alien has been tried for extraterritorial actions having no United States victims. The Circuit Court's holding that jurisdiction lies in this case is not supported by any known legal principle either in our statutes or comon law and is in direct conflict with the decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Columba-Colella* (604 F.2d 356 [5th Cir. 1979]). Moreover, the Second Circuit's decision jeopardizes our position in the international legal system by its disregard of mutuality of comity between sovereign nations.

In discussing the extraterritorial effect of our criminal statutes, the Court in *United States v. James-Robinson* (515 F. Supp. 1340, 1342-1343 [S.D. Fla. 1981]) made the following cogent observations:

> [1, 2] International law has long been recognized as being part of our law. *The Paquete Habana*, 175 U.S. 677, 700 20 S.Ct. 290, 299, 44 L.Ed.2d 320 (1900); see *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1161, 1178-79 (E.D. Pa. 1980). It applies even in the absence of a specific treaty, and must be ascertained and applied by the Court when necessary. *Habana*, 175 U.S. at 700, 20 S.Ct. at 299.

An American statute may override international law, but only when Congress has expressed the clear intent to supersede the existing law of nations. *E.g., Murray v. The Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804); *see Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933) (statute interpreted to conform with prior treaty); *Zenith*, 494 F. Supp. at 1179; Restatement (Second) of the Foreign Relations Law of the United States §§3(3), 145(1).

The law of this country, as well as England, is and has always been that an act done outside the country by a nonresident alien does not subject him to criminal jurisdiction in this country even though there may have been some consequences here (see, Halisbury's Laws of England, par. 74, "Extraterritorial Jurisdiction"; Oppenheim, International Law, sec. 147 [3rd ed. 1920]; *United States v. Bowman*, 260 U.S. 94, 43 S.Ct. 39; 67 L.Ed. 149 [1922]; *United States v. Columba-Colella, supra*, 604 F.2d 356). The only exception to this rule is when the consequences of the extraterritorial activity pose a clear detriment or danger to this country or its citizens (see, e.g., *Rocha v. United States*, 288 F.2d 545 [9th Cir. 1961]; *Rivard v. United States*, 375 F.2d 882 [5th Cir. 1967]; *United States v. Pizzarusso*, 388 F.2d 8 [2d Cir. 1968]; *Charon v. United States, 412 F.2d 657 [9th Cir. 1969]; United States v. Winter*, 509 F.2d 975 [5th Cir. 1975]; *United States v. Egan*, 501 F. Supp. 1252 [S.D.N.Y. 1980]).[1] The Circuit Court, contrary to these well established principles of domestic and international law, held that jurisdiction exists without even bothering to enunciate which basis supports jurisdiction. It is clear, however, that no basis for jurisdiction exists in this case.

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1. Any argument that *United States v. Davis* (608 F.2d 555 [5th Cir. 1979]) is contrary to these well accepted principles is without merit. In *Davis* there was a conspiracy in which overt acts were done inside the United States.

International law has recognized, in varying degrees, five bases of jurisdiction with respect to the enforcement of the criminal law (See Harvard Research In "International Law, Jurisdiction With Respect To Crime, 29 Am J. Int'l. L. Spec. Supp. 435, 445 (1935) [hereinafter cited as Harvard Research] *United States v. Pizzarusso, supra*, 388 F.2d 8).

The five bases of jurisdiction are as follows:

1. Nationality—jurisdiction based upon the nationality of the accused.

2. Passive Personality—jurisdiction is determined by reference to the nationality of the person injured.

3. Territoriality—jurisdiction based upon the commission of the act within the borders of the sovereign.

4. Protective—jurisdiction attaches where conduct outside the borders of the sovereign threatens its security or the operation of its governmental function.

5. Universality—jurisdiction is determined by the custody of a person committing acts which universally threaten the safety of all nations, e.g., hijacking, piracy, and white slavery (This basis for jurisdiction is obviously not applicable in this case).

(See, e.g., *Rivard v. United States, supra*, 375 F.2d 882 [5th Cir. 1967], cert. denied, 389 U.S. 884, 88 S.Ct. 151; *United States v. Pizzarusso, supra*, 338 F.2d 8; Harvard Research, p. 445).

Kaare Gilboe is a nonresident alien whose actions occurred outside the borders of this country with no detrimental effects to the United States government, its corporations or citizens. All of the alleged victims are either foreign shipowners, corporations or a foreign government. In the first incident (Counts One and Two), all of Mr. Gilboe's actions took place in Hong Kong. The ship, the Kanishka, was Indian owned and registered and its charterer was the People's Republic of China. Bundo Lines was a Hong Kong cor-

poration (Oceantrans is a Panamanian corporation). The brokerage firms alleged to have been victimized, Moller Steamship and Librand Shipping are Danish and English, respectively. Libra Shipping is a Panamanian corporation. Libra did have offices in Manhattan and numerous communications between Hong Kong and New York transpired before the conclusion of the Charter Party between Bundo Lines and Librand.

In the second incident (counts three through eight) all of Mr. Gilboe's actions took place in Japan. The Jaget Vijeta, Oinoussian Superiority, and Asian Adventure were Indian, Greek and Danish owned, respectively. They were all of foreign registry, and were chartered by the People's Republic of China. The brokerage firms Howard Holder and Clarkson's were English and all communications were outside of the United States. The only connection with the United States was the use of foreign banks located in Manhattan to act as intermediaries in the telegraphic transfer of funds from China to the Cayman Islands.

In applying these facts to the aforementioned bases of jurisdiction, it is obvious that jurisdiction cannot be found here based upon nationality. To reiterate, Mr. Gilboe was at all times a nonresident alien of the United States. Moreover, jurisdiction did not attach in this case under the passive personality basis since none of the persons allegedly injured were nationals of the United States. In addition, it is very questionable whether the United States courts are willing to apply this basis to obtain jurisdiction.

By the strict definition of territoriality, jurisdiction would not lie since the defendant was outside the U.S., in Hong Kong and Tokyo, when all the acts charged to him were allegedly committed. Our courts, however, have also developed the "objective territorial" theory of jurisdiction "as a means of expan-

ding the power to control activities detrimental to the state" (*United States v. Pizzarusso, supra*, 388 F.2d at p. 10). Justice Holmes defined this principle as follows:

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power. (*Strassheim v. Daily*, 221 U.S. 280, 285, 31 S.Ct. 558, 560, 55 L.Ed. 735 [1911]).

The Second Circuit Court of Appeals in discussing the objective territorial principle, has held:

> Underlying this principle is the theory that the "detrimental effects" constitute an element of the offense and since they occur within the country, jurisdiction is properly invoked under that territorial principle. See also Restatement (Second), Foreign Relations Law Section 18. (*United States v. Pizzarusso, supra*)

In this case it was never demonstrated, let alone alleged, that the acts charged to the defendant were intended to or did produce detrimental effects in the United States. Indeed, the Circuit Court does not, at any time in its decision, state that there were detrimental effects in this country. The reason is there simply were none.

As to Counts One and Two of the indictment, the acts committed outside the jurisdiction could only have produced a detrimental effect on the government of China, the shipowners who were all foreigners and a British corporation. Obviously, neither the U.S. nor anyone in this country suffered any detrimental effects as a result of the acts charged to the defendant.

With respect to the remaining counts of the indictment, a detrimental effect could only have been

felt by the Government of China, the foreign shipowners and two British ship brokerage firms. The only link alleged between the acts charged and this country is the use of a U.S. branch of a foreign bank to transfer money from China to the Cayman Islands. This can hardly be termed a detrimental effect on this jurisdiction under any view of the facts.

Examples of what courts have held to be a detrimental effect within this jurisdiction are drug smuggling (*United States v. Daniszewski*, 380 F. Supp. 113 [E.D.N.Y. 1974]; and theft and forgery of United States social security checks (*United States v. Fernandez*, 496 F.2d 1294 [5th Cir. 1974]). A detrimental effect of these kinds is clearly lacking in this case.

The Department of Justice has, in the past, recognized that jurisdiction cannot be exercised over foreign nationals absent a showing of knowledge or intent to cause an effect in or to the United States (*United States v. James-Robinson, supra*, 515 F. Supp. at 1343). During Congressional deliberations concerning enactment of 21 U.S.C. §955a, the Department of Justice expressed its belief that the bill did not comply with the principles of international law.

> "Under international law, a state *does not have jurisdiction* to proscribe the conduct in question . . . To have jurisdiction over . . . distribution of controlled substance by a non-U.S. citizen or foreign vessels on the high seas, the United States *must show an actual or potential effect within its territory.* It is doubtful that such an adverse effect could be demonstrated in the absence of intent to import the substance into the United States or knowledge that it will be imported". (Letter from Patricia M. Wald, Assistant Attorney General [April 11, 1979], *reprinted in* H.R. Rep. No. 323, 96th Cong., 1st Sess. 16 [1979]).

Here, there has been absolutely no showing of intent to cause an effect in the United States.

When Congress wishes to reach extraterritorial acts, their intentions are made known by language which is quite clear and specific. An example of this specific language is 21 U.S.C. §955a which provides in pertinent part as follows:

> §955a. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels
>
> Vessels of United States or vessels subject to jurisdiction of United States on high seas
>
> (a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.
>
> Citizens of United States
>
> (b) It is unlawful for a citizen of the United States on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.
>
> Vessels within customs waters of United States
>
> (c) It is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.
>
> Intent or knowledge of unlawful importation into United States
>
> (d) It is unlawful for any person to possess, manufacture, or distribute a controlled substance—
>
> (1) intending that it be unlawfully imported into the United States; or
>
> (2) knowing that it will be unlawfully imported into the United States.

As can be readily seen, subdivision (a) of this statute exemplifies the territoriality basis of jurisdiction; sub-

division (b) the nationality basis; subdivision (c) territoriality and subdivision (d) the objective territorial theory of jurisdiction. In contrast, the language of the two statutes under which Mr. Gilboe is charged, 18 U.S.C. §1343 and 18 U.S.C. §2314 contains no language even remotely indicative of a grant extraterritorial jurisdiction. Moreover, subdivision (d) of 21 U.S.C. §955a underscores the basic principle that jurisdiction exists over the extraterritorial acts of a nonresident alien only where those acts produce a detrimental effect to this country or were designed to do so. Where there is no detriment to the United States, but merely foreign victims, Congress requires that the acts be done within the United States and has enacted separate and detailed statutes to encompass such activity (see 18 U.S.C. §§478, 488 and 489). In this case there has been no showing of any detrimental effect actually produced or intended to be produced in this country and all of the acts charged to Mr. Gilboe were done outside this country.

Finally, under the protective basis for jurisdiction, all the elements of the crime occur in the foreign country and jurisdiction attaches since these actions have a "potentially adverse effect" upon security or governmental functions and there need not be any actual effect in the country as is required under the objective territorial principle (*United States v. Pizzarusso, supra*, 388 F.2d at 10-11). A completely foreign conspiracy to assassinate the President of the United States or to smuggle drugs into this country would fall within the protective basis of jurisdiction. The facts of this case certainly do not support jurisdiction under this basis.

In its decision, the Circuit Court seems to rely on *United States v. Sindona* (636 F.2d 792 [2d Cir. 1980], cert. denied 451 U.S. 912 [1981]) to support its finding of jurisdiction. In particular, the Court stated that

"jurisdiction under section 1343 is satisfied by defendant's use of the wires to obtain the proceeds of his fraudulent scheme." This, however, puts the cart before the horse: It is not the violation of a statute which gives a Court jurisdiction but rather jurisdiction which gives the Court the power to enforce a statute. Moreover, in *Sindona* there was no doubt that the extraterritorial acts of the defendant therein produced a severe detrimental effect in this country, i.e., the collapse of the Franklin National Bank, an F.D.I.C. insured bank. As already observed, there was absolutely no detrimental effect to the United States in this case, a fact tacitly acknowledged by the Circuit Court's and the U.S. Attorney's silence on the matter. In addition, it should be noted that 18 U.S.C. 1343 deals with radio and television communications as well as telephone communications. By virtue of the Circuit Court's holding, anybody transmitting such signals which happen to cross any portion of this country would be subject to jurisdiction here. Surely, it could not have been intended that the scope of United States jurisdiction would be so broad and, in any event, it would not be permitted under international law.

It sometimes happens that the courts will strain to find that jurisdiction exists in a particular case. In doing so, the courts are no doubt exercising their proper function of safeguarding the nation's laws. However, in this case there are strong countervailing policy considerations which argue against expansion of jurisdiction. Such considerations include but are not limited to the following:

1. The supposed victim of the first transaction asserted in the indictment is Librand Shipping, Ltd. which the U.S. Attorney contends is a wholly owned subsidiary of a Panamanian corporation that had of-

fices in New York. The choice of citizenship of Librand Shipping and Libra Shipping are for the purposes of avoiding United States laws such as its tax laws and S.E.C. regulations. Furthermore, this deal was deliberately structured to avoid being subject to U.S. law. Should we now give protection to those who have, in effect, blatantly said we will disregard your laws and not pay your taxes?

2. It is quite apparent that the crimes charged in the indictment have a very tenuous nexus with the United States. Subjecting the defendant to the jurisdiction of the courts in this country will be giving approval to foreign states trying our citizens for acts which have little or no relation to those states.

3. The two countries directly involved in this case, Britain and Japan, after conducting investigations, concluded that there were inadequate grounds for an indictment. United States involvement in this case was of a most tangential nature. If the United States felt itself responsible as a sort of policeman of the world to assume jurisdiction of every case where there were transmissions across our country from outside our borders, it would choke our congested courts which are now struggling to protect our own citizens.

In light of all of the above considerations, it is not surprising that there have been no prior cases in which a nonresident alien has been tried for extraterritorial actions having no United States victim.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MARVIN M. DAVID
Counsel for Petitioner

NEAL FACTOR & ALAN SHWEKY
Of Counsel

APPENDIX "A"
OPINION OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1106—August Term, 1981
(Argued May 11, 1982 Decided July 23, 1982)
Docket No. 81-1481

UNITED STATES OF AMERICA,

Appellee,

-v-

KAARE GILBOE, JR.,

Defendant-Appellant.

Before:
FEINBERG, *Chief Judge,*
NEWMAN and WINTER, *Circuit Judges*

Appeal by defendant Kaare Gilboe, Jr. from a judgment of conviction in the United States District Court for the Southern District of New York, Richard Owen, J., after a jury trial, on all eight counts of an indictment charging wire fraud in violation of 18 U.S.C. §1343 and interstate and international transportation of funds obtained by fraud in violation of 18 U.S.C. §2314.

Judgment affirmed.

NEAL FACTOR, Long Island City, N.Y., *for Defendant-Appellant*

MICHAEL S. FELDBERG, Assistant United States Attorney for the Southern District of New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Walter P. Loughlin, Assistant United States Attorney, of Counsel), *for Appellee.*

FEINBERG, *Chief Judge:*

Defendant Kaare Gilboe, Jr. appeals from a judgment of conviction in the United States District Court for the Southern District of New York, after a jury trial before Judge Richard Owen, on all eight counts of an indictment charging wire fraud in violation of 18 U.S.C. §1343 and transportation of funds obtained by fraud in violation of 18 U.S.C. §2314. Defendant was sentenced to a total of 20 years in prison on seven of the eight counts and fined $43,000. On the remaining count, defendant's sentence was suspended with a five-year probationary period to commence upon his release from prison but conditioned upon restitution to the victims of his fraudulent scheme. Defendant is presently incarcerated. His principal arguments on appeal are that the district court had no jurisdiction over the offenses charged and that venue was improper in the Southern District of New York. For the reasons stated below, we affirm the judgment of the district court.

I. FACTS

Defendant's massive fraud on the international shipping industry left victims on the continents of Asia, North America and Europe. The scheme involved several other apparently fraudulent transactions but the charges against defendant in this case stem from two shipments of grain ar-

ranged by defendant to the People's Republic of China, one from Argentina and the other from the United States. Although defendant's scheme was complex, we set forth below only the facts pertinent to the issues before us.

Negotiations for the grain shipment from Argentina began in late 1978 when defendant, a citizen of Norway and resident of Hong Kong, was general manager of a Hong Kong ship brokerage firm. Defendant represented to a corporation owned by the People's Republic of China that he was an agent for shipowners with ships available to transport grain. These ships did not exist. But once defendant secured the contract to transport grain, he obtained ships through negotiations with the Manhattan office of a shipowner, using telex and telephone communication channels, and substituted those ships for the non-existent ones. When the grain was loaded in Argentina in February 1979, the Chinese corporation paid defendant $617,064.49, as required. At about the same time, defendant was supposed to pay the shipowner 90% of the agreed freight due. Instead of doing so, however, defendant caused most of the money he received to be transferred to a bank in the Bahamas using a Manhattan branch of Barclays Bank International. Defendant claimed at trial that a Bahamian company was supposed to pay the shipowner. The victims of defendant's scheme were the shipowner and the People's Republic of China, which subsequently paid $242,117.40 more than the original contract required in order to avoid the shipowner's lien on the grain.

The grain shipments from New Orleans involved the same complicated type of transaction, although defendant used an office in Tokyo and different business connections. This time the scheme netted even greater deposits in the Bahamian bank account, at the expense again of the People's Republic of China as well as three shipowners. In August 1980, a corporation owned by the People's Republic of China paid defendant $1,015,740.67 for one shipment of grain, $968,624.08 for a second and

$944,999.19 for a third. At defendant's direction, this money was forwarded from the Bank of China, Peking, to the Bank of Tokyo in New York, to the Manhattan office of the Royal Bank & Trust Company, to the Republic National Bank in Manhattan, to the Channel Islands, back to New York at the Chase Manhattan Bank and finally to Chase Manhattan Bank in Nassau, Bahamas. Defendant again claimed that a Bahamian company was supposed to pay the shipowners.

Defendant admitted involvement in the transactions but asserted that he was acting at the direction of others and was merely an innocent victim. At sentencing, the district judge found defendant's testimony "a tissue of perjury."

II. DISCUSSION

Appellant argues that the district court did not have jurisdiction over the offenses charged because he was a nonresident alien whose acts occurred outside the United States and had no detrimental effect within the United States. In connection with the Argentina and New Orleans transactions, defendant was charged with both wire fraud under 18 U.S.C. §1343 and transportation of funds obtained by fraud under 18 U.S.C. §2314.

Turning first to the former charges, defendant was convicted on four counts of wire fraud under §1343, reproduced in the margin.[1] Defendant admitted that, in

1. 18 U.S.C. §1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

negotiating with the Manhattan shipowner for the shipment from Argentina, he had telephone and telex conversations with a ship broker in Bayshore, Long Island and that he caused other telex and telephone negotiations to occur between Manhattan and Hong Kong. These negotiations were to obtain ships to transport the grain, a key element of the fraud. The evidence was clearly sufficient to sustain jurisdiction on this offense, which forms the basis for count one. United States v. Hasenstab, 575 F.2d 1035, 1039-40 (2d Cir.), cert. denied, 439 U.S. 827 (1978). With respect to the shipments from New Orleans, defendant also admitted that he caused the payments received from the Chinese corporation to be electronically transferred through Manhattan banks to accounts in the Bahamas, the basis for counts three, four and five. This evidence was sufficient to justify asserting jurisdiction over defendant. As we found in United States v. Sindona, 636 F.2d 792, 802 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981), jurisdiction under §1343 is satisfied by defendant's use of the wires to obtain the proceeds of his fraudulent scheme.

With respect to the conviction on counts charging violations of §2314, reproduced in the margin,[2] defendant's jurisdictional argument depends on his premise that the section applies only to the transportation of tangible items and does not cover "electronic crediting and debiting," the means by which the funds in defendant's scheme moved from one bank to another. However, if such transfers of money are covered by §2314, defendant's attack on jurisdiction fails because the evidence clearly showed that

2. 18 U.S.C. §2314 provides, in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

defendant had aided and abetted the transportation in foreign commerce through banks in Manhattan of "securities or money . . . taken by fraud." The question whether the section covers electronic transfers of funds appears to be one of first impression, but we do not regard it as a difficult one. Electronic signals in this context are the means by which funds are transported. The beginning of the transaction is money in one account and the ending is money in another. The manner in which the funds were moved does not affect the ability to obtain tangible paper dollars or a bank check from the receiving account. Indeed, we suspect that actual dollars rarely move between banks, particularly in international transactions. If anything, the means of transfer here were essential to the success of the fraudulent scheme. Defendant depended heavily on his ability to move funds rapidly out of reach of disgruntled shipowners who were to receive payment within days of loading the grain. And it was not until the funds, through a series of bank transfers, came to rest in the Bahamas that defendant's scheme was complete. See United States v. Sindona, 636 F.2d at 802. The record amply shows that the direct transfers of precise amounts received through fraud were in a manner clearly indicating that the fraud and transfer were a single transaction. The primary element of this offense, transportation, "does not require proof that any specific means of transporting were used." Pereira v. United States, 347 U.S. 1, 9 (1953). Therefore, since fraudulently obtained funds were transported within the meaning of the section and banks in Manhattan were utilized, there was sufficient evidence to support jurisdiction under §2314.[3]

3. The government argues that defendant transported "money" or, in the alternative, that he transported "securities." The court charged the jury that the transfers of funds fell "within one or more of the categories of securities or moneys." Since defense counsel stated explicitly that he had "no exceptions to the charge," we do not decide whether the transfers here were of one or the other or of both.

We turn next to appellant's argument that venue was improper in the Southern District of New York. Preliminarily, there is a real question whether defendant adequately raised the issue below; if he did not, the argument is waived. United States v. Price, 447 F.2d 23, 27 (2d Cir.), cert. denied, 404 U.S. 912 (1971). Defendant contends that he objected to venue in his motion for judgment of acquittal at the close of the government's case, but the government disputes this. The record indicates that defense counsel focused on jurisdiction rather than on venue in making his motion.

However, even if we accept the dubious assumption that defendant properly challenged venue at trial, the argument is without merit. Appellant claims that under 18 U.S.C. §3238, reproduced in the margin,[4] venue would be proper only in the district in which defendant was arrested, the District of Connecticut. But defendant relies on the wrong section; §3238 applies only to offenses "not committed in any district," as its title indicates. But that is not the situation here. The appropriate section to apply in this case is 18 U.S.C. §3237(a), which provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be in-

4. 18 U.S.C. §3238 provides:

Offenses not committed in any district

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

quired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

As already indicated, there were numerous telexes and telephone calls between New York and Hong Kong and other parts of the world. Also, the proceeds of the fraud were all transferred through New York so that "such commerce" moved "from, through, or into" the Southern District of New York. Therefore, venue was proper in that district under the section quoted above.

We have carefully considered the other arguments defendant raises and find them without merit.

The judgment is affirmed.

APPENDIX "B"
CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE 1, Section 9, Clause 3. Bill of attainder and ex post facto laws

No Bill of Attainder or ex post facto Law shall be passed.

ARTICLE II, Section 2, Clause 3. Criminal Trial by Jury

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "C"
STATUTORY PROVISIONS INVOLVED

15 U.S.C. 1693

SUBCHAPTER VI—ELECTRONIC FUND TRANSFERS

§1693. Congressional Findings and declaration of purpose

(a) The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and intermediaries in electronic fund transfers undefined.

(b) It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.

(Pub. L. 90-321, Title IX, §902, as added Pub. L. 95-630, Title XX, §2001, Nov. 10, 1978, 92 Stat. 3728).

§1693a. Definitions

As used in this subchapter—

(1) the term "accepted card or other means of access" means a card, code, or other means of access to a consumer's account for the purpose of initiating electronic fund transfers when the person to whom such card or other means of access was issued has requested and received or has signed or has used, or authorized another to use, such card or other means of access for the purpose of transferring money between accounts or obtaining money, property, labor, or services;

. . . . . .

(2) the term "account" means a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 1602(i) of this title), as described in regulations of the Board, established primarily for personal, family, or household purposes, but such term does not include an account held by a financial institution pursuant to a bona fide trust agreement;

(3) the term "Board" means the Board of Governors of the Federal Reserve System;

(4) the term "business day" means any day on which the offices of the consumer's financial institution involved in an electronic fund transfer are open to the public for carrying on substantially all of its business functions;

(5) the term "consumer" means a natural person;

(6) the term "electronic fund transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone. Such term does not include:

(A) any check guarantee or authorization service which does not directly result in a debit or credit to a consumer's account;

(B) any transfer of funds, other than those processed by automated clearinghouse, made by a financial institution on behalf of a consumer by means of a service that transfers funds held at either Federal Reserve banks or other depository institutions and

which is not designed primarily to transfer funds on behalf of a consumer;

(C) any transaction the primary purpose of which is the purchase or sale of securities or commodities through a broker-dealer registered with or regulated by the Securities and Exchange Commission;

(D) any automatic transfer from a savings account to a demand deposit account pursuant to an agreement between a consumer and a financial institution for the purpose of covering an overdraft or maintaining an agreed upon minimum balance in the consumer's demand deposit account; or

(E) any transfer of funds which is initiated by a telephone conversation between a consumer and an officer or employee of a financial institution which is not pursuant to a prearranged plan and under which periodic or recurring transfers are not contemplated;

as determined under regulations of the Board;

(7) the term "electronic terminal" means an electronic device, other than a telephone operated by a consumer, through which a consumer may initiate an electronic fund transfer. Such term includes, but is not limited to, point-of-sale terminals, automated teller machines, and cash dispensing machines;

(8) the term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer;

(9) the term "preauthorized electronic fund transfer" means an electronic fund transfer authorized in advance to recur at substantially regular intervals;

(10) the term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing; and

(11) the term "unauthorized electronic fund transfer" means an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit, but the term does not include any electronic fund transfer (A) initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer's account by such consumer, unless the consumer has notified the financial institution involved that transfers by such other person are no longer authorized, (B) initiated with fraudulent intent by the consumer or any person acting in concert with the consumer, or (C) which constitutes an error committed by a financial institution.

§1693n. Criminal liability

Violations respecting giving of false or inaccurate information, failure to provide information, and failure to comply with provisions of this subchapter

(a) Whoever knowingly and willfully:

(1) gives false or inaccurate information or fails to provide information which he is required to disclose by this subchapter or any regulation issued thereunder; or

(2) otherwise fails to comply with any provision of this subchapter;

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Violations affecting interstate or foreign commerce

(b) Whoever:

(1) knowingly, in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating $1,000 or more; or

(2) with unlawful or fraudulent intent, transports or attempts or conspires to transport in interstate or foreign commerce a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

(3) with unlawful or fraudulent intent, uses any instrumentality of interstate or foreign commerce to sell or transport a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

(4) knowingly receives, conceals, uses, or transports money, goods, services, or anything else of value (except tickets for interstate or foreign transportation) which (A) within any one-year period has a value aggregating $,1000 or more, (B) has moved in or is part of, or which constitutes interstate or foreign commerce, and (C) has been obtained with a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument; or

(5) knowingly receives, conceals, uses, sells, or transports in interstate or foreign commerce one or

more tickets for interstate or foreign transportation, which (A) within any one-year period have a value aggregating $500 or more, and (B) have been purchased or obtained with one or more counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument; or

(6) in a transaction affecting interstate or foreign commerce, furnishes money, property, services, or anything else of value, which within any one-year period has a value aggregating $1,000 or more, through the use of any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained—

shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"Debit Instrument" defined

(c) As used in this section, the term "debit instrument" means a card, code, or other device, other than a check, draft, or similar paper instrument, by the use of which a person may initiate an electronic fund transfer.

18 U.S.C. 10

§10. Interstate commerce and foreign commerce defined

The term "interstate commerce," as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.

The term "foreign commerce," as used in this title, includes commerce with a foreign country.

18 U.S.C. 478

§478. Foreign obligations or securities

Whoever, within the United States, with intent to defraud, falsely makes, alters, forges, or counterfeits any bond, certificate, obligation, or other security of any foreign government, purporting to be or in imitation of any such security issued under the authority of such foreign government, or any treasury note, bill, or promise to pay, lawfully issued by such foreign government and intended to circulate as money, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 488

§488. Making or possessing counterfeit dies for foreign coins

Whoever, within the United States, without lawful authority, makes any die, hub, or mold, or any part thereof, either of steel or of plaster, or of any other substance, in the likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining of the genuine coin of any foreign government; or

Whoever, without lawful authority, possesses any such die, hub, or mold, or any part thereof, or conceals, or knowingly suffers the same to be used for the counterfeiting of any foreign coin:

Shall be fined not more than $5,000 or imprisoned not more than fivie years, or both.

18 U.S.C. 489

§489. Making or possessing likeness of coins

Whoever, within the United States, makes or brings therein from any foreign country, or possesses with intent to sell, give away, or in any other manner uses the same, except under authority of the Secretary of the Treasury or other proper officer of the United States, any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money, either under the authority of the United States or under the authority of any foreign government shall be fined not more than $100.

18 U.S.C. 1343

§1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, §18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.

18 U.S.C. 2311

§2311. Definitions

As used in this chapter:

"Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or for flight in the air;

"Cattle" means one or more bulls, steers, oxen, cows, heifers, or calves, or the carcass or carcasses thereof;

"Money" means the legal tender of the United States or of any foreign country, or any counterfeit thereof.

"Motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails;

"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument of document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing;

"Tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a State, or evidence of the discharge thereof;

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

18 U.S.C. 2314

§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely mak-

ing, forging, altering, or counterfeiting any security or tax stamps, or any part thereof:

Shall be fined not more than $10,000 or imprisoned not more than ten years or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

18 U.S.C. 3236

§3236. Murder or manslaughter

In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs.

18 U.S.C. 3237

§3237. Offenses begun in one district and completed in another

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted

in any district from, through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

18 U.S.C. 3238

§3238. Offenses not committed in any district

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

21 U.S.C. 955a

§955a. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels

Vessels of United States or vessels subject to jurisdiction of United States on high seas

(a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

Citizens of United States

(b) It is unlawful for a citizen of the United States on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

Vessels within customs waters of United States

(c) It is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

Intent or knowledge of unlawful importation into United States

(d) It is unlawful for any person to possess, manufacture, or distribute a controlled substance:

(1) intending that it be unlawfully imported into the United States; or

(2) knowing that it will be unlawfully imported into the United States.

Exceptions: burden of proof

(e) Subsections (a), (b), and (c) of this section do not apply to a common or contract carrier, or an employee thereof, who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business or to a public vessel of the United States, or any person on board such a vessel who possesses or distributes a controlled substance in the lawful course of his duties, if the controlled substance is a part of the cargo entered in the vessel's manifest and is intended to be lawfully imported into the country of destination for scientific, medical, or other legitimate purposes. It shall not be necessary for the United States to negative the exception set forth in this subsection in any complaint, information, indictment, or other pleading or in any trial or other proceeding. The burden of going forward with the evidence with respect to this exception is upon the person claiming its benefit.

Jurisdiction and venue

(f) Any person who violates this section shall be tried in the United States district court at the point of entry where that person enters the United States, or in the United States District Court for the District of Columbia.

Penalties

(g)(1) Any person who commits an offense defined in subsection (a), (b), (c) or (d) of this section shall be punished in accordance with the penalties set forth in section 960 of this title.

(2) Notwithstanding paragraph (1) of this subsection, any person convicted of an offense under sections 955a to 955d of this title shall be punished in accordance with the

penalties set forth in section 962 of this title if such offense is a second or subsequent offense as defined in section 962(b) of this title.

Extension beyond territorial jurisdiction of United States

(h) This section is itnended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.

47 U.S.C. 153

§153. Definitions

For the purposes of this chapter, unless the context otherwise requires:

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(c) "Licensee" means the holder of a radio station license granted or continued in force under authority of this chapter.

. . . . . .

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(f) "Foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

Federal Rules of Evidence

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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No. 82-725

In the Supreme Court of the United States

OCTOBER TERM, 1982

KAARE GILBOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether transfer of funds by wire constitutes "transportat[ion of] * * * securities or money" within the proscription of 18 U.S.C. 2314.

2. Whether venue was properly laid in the Southern District of New York, where acts constituting an integral part of the offenses charged took place in that district.

3. Whether the admission of evidence of petitioner's involvement in an elaborate commercial fraud scheme similar in design to that charged in the indictment was improper under Fed. R. Evid. 404(b), where petitioner conceded that the acts charged took place but claimed he was an innocent participant.

4. Whether the district court lacked jurisdiction over the offenses charged in the indictment under principles of international law governing extraterritorial jurisdiction of nations even though acts constituting an integral part of those offenses took place in the United States.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 16

TABLE OF AUT HORITIES

Cases:

Blockburger v. *United States*, 284 U.S. 299 7

Gilbert v. *United States*, 359 F.2d 285, cert. denied, 385 U.S. 882 7-8

Pereira v. *United States*, 347 U.S. 1 ..... 6, 7

United States v. *Beechum*, 582 F.2d 898, cert. denied, 440 U.S. 920 10-11

United States v. *Beliard*, 613 F.2d 886 10

United States v. *Castillo-Felix*, 539 F.2d 9 10

United States v. *Cohen*, 516 F.2d 1358 11

United States v. *Columba-Colella*, 604 F.2d 356 ..... 14, 15

United States v. *Davis*, 608 F.2d 555 ..... 14, 15

United States v. *Erwin*, 602 F.2d 1183 10

United States v. *Figueroa*, 618 F.2d 934 13

United States v. *Menendez*, 612 F.2d 51 7

Page

Cases—Continued:

United States v. *Pizzarusso*, 388 F.2d 8 15

United States v. *Reed*, 639 F.2d 896 10

United States v. *Sheridan*, 329 U.S. 379 6

United States v. *Williams*, 589 F.2d 210, on rehearing en banc, 617 F.2d 1063 10

Statutes and rules:

15 U.S.C. (Supp. V) 1693 *et seq.* 6

15 U.S.C. 1693a(6)(E) 6

15 U.S.C. (Supp. V) 1693n 6

18 U.S.C. 1343 ..... 1, 2, 7

18 U.S.C. 2314 ..... 2, 5, 6, 7

18 U.S.C. 3237 10

18 U.S.C. 3237(a) 9-10

18 U.S.C. 3238 ..... 8, 9, 10

Fed. R. Crim. P. 18 10

Fed. R. Evid. 404(b) 10, 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-725

KAARE GILBOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 684 F.2d 235.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1982. A petition for rehearing was denied on August 24, 1982. The petition for a writ of certiorari was filed on October 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all eight counts of an indictment charging wire fraud, in violation of 18 U.S.C. 1343, and transportation in interstate and foreign commerce of funds obtained by

fraud, in violation of 18 U.S.C. 2314.[1] He was sentenced to a total of 20 years' imprisonment and fined a total of $43,000 on seven of the counts. Petitioner's sentence on the remaining count was suspended and a five-year term of probation commencing upon his release from prison imposed; a special condition of probation is the payment of restitution to the victims of petitioner's fraudulent scheme. The court of appeals affirmed (Pet. App. 1a-8a).

Petitioner's convictions arose out of an elaborate fraudulent scheme perpetrated upon the international shipping industry by petitioner in 1978-1979, and repeated in 1980. The facts relating to the earlier transactions are as follows: In late 1978, petitioner was general manager of Bundo Lines, a Hong Kong ship brokerage firm. Falsely claiming to represent a shipowner, petitioner contracted with China National Chartering Corporation, a company owned by the People's Republic of China, to transport grain from Argentina to China on three ships that did not in fact exist. After that deal had been made, petitioner obtained the ships necessary to perform the contract through negotiations conducted by telephone and telex with the Manhattan office of a shipowner. In February 1979, as required by its contract with Bundo Lines, the Chinese corporation paid petitioner partial freight charges of $617,064.49 in respect of a shipment of grain loaded upon the first of these vessels,

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[1]Counts One and Two charged petitioner and James Lam with wire fraud, in violation of 18 U.S.C. 1343, and with interstate and international transportation of money and securities obtained by fraud, in violation of 18 U.S.C. 2314, based on transactions completed in 1979. Counts Three through Five charged petitioner and Richard Cunningham with wire fraud, and Counts Six through Eight charged petitioner and Cunningham with interstate and international transportation of money and securities obtained by fraud, based on separate transactions that occurred in 1980. Neither Lam nor Cunningham has been apprehended for trial.

the *Kanishka*. By its contract with the shipowner, Bundo was then required immediately to transfer this remittance to the latter. Petitioner made no such payment. Instead, using a New York City branch of Barclays Bank International, petitioner arranged for most of the funds he had received to be transferred to a bank in the Bahamas to the credit of an untraceable firm called Commonwealth Brokers, Ltd. Bundo never paid the *Kanishka's* owners any of the money due them under the contract.[2] Moreover, China National Chartering Corp. was forced to pay the owners of the *Kanishka* $360,000 in additional charges in order to avoid the shipowner's lien on the grain.[3] (Tr. 66-70, 72, 75, 81, 89-91, 100-103, 109-110, 115-116, 128-130, 137, 139-141, 148-150, 166-167, 207-208, 383-384, 647; GX 10-13, 50-53.)

The remaining vessels chartered by Bundo to fulfill its contract with China National were the *Costanza M* and the *Aiolos*. These vessels, too, took on grain and set sail for China. On February 10, 1979, China National paid freight charges of $637,003.50 to Bundo Lines in respect of the shipment on the *Costanza M*. Once again, Bundo Lines never made payment to the vessel's owners; China National was obliged to pay additional freight directly to the owners of the *Costanza M* to secure release of her cargo of grain. China National also paid Bundo freight charges in respect of the *Aiolos*, but it was able to stop payment before that transfer of funds was completed, ultimately paying the

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[2]The shipping firm was able to arrest a bank account belonging to Bundo. After litigation, the shipping firm received between $40,000 and $50,000 from that account.

[3]Including its payment to petitioner of $617,069.49, the Chinese Company thus paid out more than $242,000 in excess of its total contractual liability to Bundo for freight.

freight charges directly to the vessel's owners (Tr. 81-83, 91-92, 242, 246-248).[4]

In 1980, petitioner again swindled a commercial instrumentality of the People's Republic of China, employing an artifice similar to that previously employed. This time petitioner operated out of the offices of a Japanese ship brokerage firm, Tokyo Freighting. Falsely claiming to represent a Taiwanese shipowner and operating through a London ship broker as intermediary, he secured contracts from the Chinese to transport grain from the United States to China on three ships. Then, falsely claiming to represent a Hong Kong shipping firm, petitioner chartered the three vessels needed to perform the grain delivery contracts from another ship broker, Tokyo Chartering. In late August 1980, the Chinese company paid almost three million dollars as partial freight charges for the three grain shipments. Pursuant to petitioner's instructions, payment was made to the New York City office of a foreign bank. Several interbank transfers were then made involving domestic and foreign banks in New York. The funds were then transferred to the Channel Islands, back to the Chase Manhattan Bank in New York, and ultimately to the account of Numan Construction and Development Co. with the Chase Manhattan Bank in Nassau, Bahamas. Numan had the same address as Commonwealth Brokers, Ltd., the recipient of the freight charges in the *Kanishka* transaction. The owners of the ships that delivered the grain never received any portion of these funds. The Chinese government ultimately made direct payment to the shipowners of more than $1.5

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[4]Because petitioner's fraudulent scheme failed in the case of the *Aiolos*, and because the *Costanza M* transaction could not be tied by the available evidence to the Southern District of New York, petitioner was not charged with offenses based on those transactions. See page 11, *infra*.

million to secure release of the grain (Tr. 273, 281, 301, 307-320, 335-337, 369, 393, 396, 402, 404, 412-413, 456-457, 478; GX 63-65, 71-73, 76, 79, 81, 83, 100-103, 110-112, 120-122).

Petitioner testified at his trial. He admitted his involvement in each of the foregoing transactions but claimed that in each case he was the innocent victim of others. At sentencing the district court stated (Sentencing Tr. 7):

> I listened to your testimony on the stand as a defendant. I am as confident as the jury was that it was a tissue of perjury and I make such a finding in connection with this sentencing today.

ARGUMENT

1. Petitioner first claims (Pet. 6-12) that his conduct did not violate 18 U.S.C. 2314, arguing that wire transfer of funds does not constitute transportation of money within the meaning of that statute.[5] The opinion of the court of appeals rejecting that contention (Pet. App. 5a-6a) is clearly correct, however, and does not conflict with any decision of this Court or of any other court of appeals.

The plain language of Section 2314 prohibits the "transport[ation] in * * * foreign commerce [of] any * * * securities or money of the value of $5,000 or more, knowing the same to have been * * * taken by fraud." This is precisely what petitioner accomplished by arranging for wire transfers of the funds obtained by fraud in this case. This Court has

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[5]The evidence at trial showed that $535,769.77 of the proceeds of petitioner's fraudulent transactions involving the *Kanishka*, was electronically transferred from Hang Lung Bank, Hong Kong, to Barclays Bank International, New York, and thence to Barclays Bank International, Nassau, Bahamas (GX 50, 53). The proceeds of the fraudulent transactions in 1980 were transferred telegraphically from China to New York. From there, the funds were transferred, in part by wire and in part by check, to the Channel Islands, back to New York, and ultimately to the Bahamas (GX 100).

recognized that "[t]he transporting charge does not require proof that any specific means of transporting were used." *Pereira* v. *United States*, 347 U.S. 1, 9 (1954). Moreover, one who takes steps that he knows will cause transportation of fraudulently obtained funds is liable under the statute. See *United States* v. *Sheridan*, 329 U.S. 379 (1946). Petitioner has suggested no reason why a wire transfer such as he employed in this case should not be regarded as transportation of fraudulently obtained monies.[6]

Petitioner's argument appears to rest (Pet. 8), in part, upon the premise that the funds transferred in this case did not constitute either money or securities for purposes of Section 2314. As the court of appeals noted (Pet. App. 6a n.3), there is no need to consider this contention because the district court charged the jury that the items transferred fell "within one or more of the categories of securities or

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[6]Contrary to petitioner's unsupported contention (Pet. 8), nothing in the statute requires transportation of monies by a physical medium. Nor is there anything in the legislative history material cited by petitioner (*ibid.*) that supports petitioner's contention that electronic transfers were excluded from the operation of the statute. These documents contain no reference that we can find to electronic transfers.

Nor does the enactment in 1978 of separate legislation, 15 U.S.C. (Supp. V) 1693 *et seq.*, to govern electronic fund transfers reflect a judgment by Congress that 18 U.S.C. 2314 did not cover *any* such transfers, or the particular transactions at issue here. Petitioner's contention (Pet. 10) is unsupported by any reference to pertinent legislative history. In any event, 15 U.S.C. (Supp. V) 1693a(6)(E), the pertinent definitional provision of the 1978 Act, makes clear that the Act does not govern "any transfer of funds which is initiated by a telephone conversation between a customer and an officer or employee of a [bank] which is not pursuant to a prearranged plan and under which periodic or recurring transfers are not contemplated." Moreover, the criminal provisions of the 1978 Act, 15 U.S.C. (Supp. V) 1693n, apply to acts such as fraudulent use of a card or device used to secure cash from an automatic teller machine, or such use of a card that permits debiting of a customer's bank account for retail purchases. Thus the 1978 Act was not intended to cover petitioner's one time transaction—an old-fashioned fraud that made incidental use of modern technology.

moneys," and petitioner made no objection to this instruction. In any event, petitioner's contention is unsound. Petitioner does not even attempt to explain why his transfers did not involve "money" within the meaning of Section 2314,[7] and we are aware of no basis for any such contention. There is thus no need to explore whether the transfers also involved "securities" within the meaning of Section 2314.

For the foregoing reasons, petitioner's conduct proven at trial was that proscribed by the plain language of Section 2314. Petitioner's novel contention (Pet. 6) that the court of appeals' decision so holding "constitutes ex post facto legislation" and works a denial of due process accordingly requires no further response.[8]

2. Petitioner next claims (Pet. 13-17) that venue was improperly laid in the Southern District of New York. At the outset we note that petitioner raised this claim for the first time in the court of appeals. In specifying grounds for his motion for acquittal at the close of the government's case petitioner made no mention of venue, even though the factual basis for his claim was apparent, at the latest, at that juncture. Petitioner's objection to venue was accordingly waived. *United States* v. *Menendez*, 612 F.2d 51, 54-55 (2d Cir. 1979); *Gilbert* v. *United States*, 359 F.2d 285, 288 (9th

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[7]Although not explicitly so labelled, petitioner's argument (Pet. 8) addresses the meaning of only the term "securities" in Section 2314.

[8]Petitioner's contention (Pet. 11), citing *Pereira* v. *United States*, *supra*, that his conviction of offenses under both 18 U.S.C. 1343 and 18 U.S.C. 2314 violates the rule of *Blockburger* v. *United States*, 284 U.S. 299 (1932), is not properly presented in this Court because it was not raised below. In any event, the contention is unsound. Indeed this Court's decision in *Pereira* rejects just such a claim. 347 U.S. at 9.

Cir.), cert. denied, 385 U.S. 882 (1966).[9] Petitioner's contention is, in any event, without merit.

Petitioner's claim is that pursuant to 18 U.S.C. 3238 venue was proper only in Connecticut, the district where he was arrested.[10] The court of appeals correctly rejected this contention (Pet. App. 7a-8a), observing that Section 3238 applies only to offenses not committed in any judicial district, whereas petitioner's offense was committed, at least in part, in the Southern District of New York, through which the proceeds of the frauds were transferred and various communications essential to their accomplishment were made. The court stressed that the proceeds of the fraud in

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[9]The court of appeals stated (Pet. App. 7a) that "there is a real question whether defendant adequately raised th[is] issue below." In the court of appeals petitioner claimed (Br. 14-15) that he had raised his venue objection in his motion for a judgment of acquittal. The trial transcript (Tr. 498) reflects, however, that petitioner raised only a claim of lack of jurisdiction (see pages 14-16, *infra*). The court of appeals accordingly remarked (Pet. App. 7a) that "[t]he record indicates that defense counsel focused on jurisdiction rather than on venue in making his motion." The court of appeals nevertheless reached the merits of the venue issue, accepting, arguendo, "the dubious assumption that defendant properly challenged venue at trial" (Pet. App. 7a).

In this Court petitioner has pointed to nothing in the record to support that assumption. We note that petitioner has not identified any respect in which he was prejudiced by the location of his trial.

[10]18 U.S.C. 3238 provides:

Offenses not committed in any district

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

question had moved "from, through, or into" the Southern District of New York. The court of appeals accordingly concluded that all of the offenses were prosecutable in that location under 18 U.S.C. 3237(a).[11]

Petitioner's contention rests upon the peculiar theory (Pet. 14-17) that Section 3238 provides the exclusive basis for venue as to any offense begun outside the United States even though the offense involves foreign commerce that passes through a judicial district of the United States and is accordingly, under the plain language of Section 3237(a), prosecutable in that district—here, the Southern District of New York.[12] Petitioner adduces no relevant support for this novel contention. Even if the petitioner were correct in suggesting (Pet. 15) that the disjunctive reference in Section 3238 to offenses "begun *or* committed" outside any district renders it applicable to offenses such as his, that are begun outside the United States, but also committed in part in some judicial district, the second paragraph of Section

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[11]Section 3237(a) provides (emphasis added):

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted *in any district from, through, or into which such commerce or mail matter moves.*

[12]Petitioner's suggestion (Pet. 14) that the court of appeals considered only the title of Section 3238 and not its language is simply untrue.

3237(a) plainly provided an alternative venue in the Southern District of New York.[13]

3. Petitioner next contends (Pet. 17-20) that the district court admitted evidence of petitioner's criminal acts similar to those with which he was actually charged contrary to Fed. R. Evid. 404(b). More specifically, petitioner claims that the district court allowed admission of such evidence as part of the government's case in chief, rather than awaiting rebuttal, in contravention of prevailing Second Circuit authority. These claims are without merit.

a. Rule 404(b) permits the admission of "other crimes" evidence for purposes including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The courts of appeals have consistently held that extrinsic crime evidence may be admitted under Rule 404(b) if (1) the evidence proffered is relevant to an issue disputed at trial other than the defendant's character, and (2) the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice. See, e.g., *United States* v. *Reed*, 639 F.2d 896 (2d Cir. 1981), and cases cited therein; *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440

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[13]Petitioner's reliance (Pet. 15) upon *United States* v. *Castillo-Felix*, 539 F.2d 9, 13 (9th Cir. 1976), is doubly misplaced because the court of appeals did not decide in that case whether venue rested upon 18 U.S.C. 3238 or Fed. R. Crim. P. 18; a fortiori the Ninth Circuit did not suggest that Section 3238 prescribed an exclusive venue where an offense begins outside the United States. *United States* v. *Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979), and *United States* v. *Williams*, 589 F.2d 210, 212-213 (5th Cir. 1979), on rehearing *en banc*, 617 F.2d 1063 (5th Cir. 1980), cited by petitioner (Pet. 16), clearly recognize that where applicable Section 3238 may provide a venue alternative to that prescribed by Section 3237(a). Finally, *United States* v. *Beliard*, 618 F.2d 886, 887 (1st Cir. 1980), cited by petitioner (Pet. 15), suggests that venue is proper under 18 U.S.C. 3237 as well as 18 U.S.C. 3238 where an offense is begun outside the United States.

U.S. 920 (1979). Here, the district court held a hearing outside of the presence of the jury and determined that the similar act evidence proffered by the government met these criteria. Further review by this Court of this essentially fact-based claim is unnecessary.

The "other crimes" evidence in question has two aspects. First is evidence pertaining to petitioner's defalcations involving the *Constanza M* and the *Aiolos* (see pages 3-4, *supra*). Although petitioner's fraud respecting the latter ships was not directly the subject of the prosecution (see page 4 note 4, *supra*), it was, as petitioner recognizes (Pet. 18), intimately related to his fraud involving the *Kanishka*. Indeed the evidence pertaining to the *Costanza M* and the *Aiolos* is largely inseparable from the evidence pertaining to the *Kanishka*, and admission of any non-overlapping evidence merely gave the jury a coherent account of what was plainly a single fraudulent scheme. See *United States* v. *Cohen*, 516 F.2d 1358, 1366 (8th Cir. 1975). Petitioner has cited no authority excluding "other crimes" evidence in these circumstances, where the "other" crimes are merely acts in furtherance of a single criminal scheme.

There was also similar act evidence at trial concerning petitioner's role in chartering three ships to Philippine National Lines in 1977. The evidence showed that in 1977 petitioner, claiming falsely that he represented shipowners, secured contracts to carry cargo from the United States to the Philippines for Philippines National Lines. In 1977, as in the later transactions, petitioner instructed the charterer to pay into a particular bank account the freight that was due when the ships loaded their cargo. And as in the later schemes, Philippines National Lines paid the money to the account specified by petitioner, but the actual shipowners never received the funds, and the money disappeared to the Bahamas (Tr. 420-434). Because the Philippine National

Lines scheme involved a different ship brokerage firm and different victims from those in the crimes with which he was actually charged, and because the former incident antedated the others by a year, petitioner contends that there is no basis for its admission under Rule 404(b). Evidence bearing upon the 1977 incident was properly admitted, however, because of the light it shed on petitioner's claim that he was the innocent victim of others in each of the fraudulent transactions.

Prior to trial, the government submitted a memorandum of law describing the other crimes evidence it planned to introduce, arguing that the evidence was relevant to the issue of common scheme or plan and also to the issue of knowledge and intent (C.A. App. 12-18).[14] The subject was raised at a pretrial conference, and petitioner's counsel was invited to respond (C.A. App. 25-29). Petitioner's counsel never argued that the transactions charged in the indictment did not take place or that petitioner had not participated in them; rather, he conceded that the issue in the case was whether petitioner had devised a fraudulent scheme, or whether he was simply an innocent victim (Gov't. Br. App. 1a-2a).[15] In view of the adoption of this line of defense, it was appropriate for the government to offer the evidence of similar and related transactions, which evidence contradicted petitioner's claim that he lacked intent to defraud.[16]

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[14]"C.A. App." denotes the joint appendix filed in the court of appeals.

[15]"Gov't. Br. App." denotes the appendix to the government's brief in the court of appeals, which reproduces the pertinent transcript.

[16]The district court admitted the evidence (Gov't. Br. App. 1a). The court instructed the jury that the similar act evidence could be considered only on the issue of petitioner's knowledge and intent, and on the question of whether the crimes charged were part of a common scheme or plan (Tr. 869-870).

b. Petitioner contends (Pet. 18-20) that admission of similar crimes evidence as part of the government's case in chief was, in any event, contrary to established Second Circuit precedent. Preliminarily, we note that even if founded, this claim, based upon application of circuit precedents, would not warrant this Court's review.[17] Moreover, in view of the strict guidance that the Second Circuit has provided respecting administration of Rule 404(b) (see Pet. 18-19), the court's fact-bound determination that admission of the other crimes evidence was, in the circumstances of this case, a proper part of the government's case in chief is of no precedential value or general importance.[18]

In any event, there was no error here, for the pretrial proceedings made perfectly clear that petitioner's defense would be that he lacked intent to defraud. There accordingly was no need to await the defense case to see if such an issue arose. Compare *United States* v. *Figueroa*, 618 F.2d 934, 939 n.1 (2d Cir. 1980). And petitioner suffered no prejudice as a result of the district court's determination that intent was to be an issue at trial, for that determination proved correct. Petitioner testified at trial that he was victimized by one Michael Rogers in the *Kanishka* transaction, by a Charles R. Hardy in the 1980 transaction, and by a John Baldwin in the 1977 Philippine National Lines transaction. The disputed evidence, however, showed that petitioner developed a complex, sophisticated scheme for defrauding shipowners and charters and used it to defraud the victims of all three transactions. This evidence was properly admitted to establish the manner in which he defrauded his victims.

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[17]Indeed, every decision cited by petitioner in connection with his other crimes evidence argument is a decision of the Second Circuit.

[18]The court of appeals did not address petitioner's other crimes evidence argument, except to say that it found it to be "without merit" (Pet. App. 8a).

4. Petitioner's final contention (Pet. 21-30) is that under principles of international law pertaining to *extraterritorial* jurisdiction of nations the district court lacked jurisdiction to try petitioner for the offenses charged in the indictment. This claim is without merit. Indeed, petitioner's entire argument rests upon a false premise, because the court of appeals correctly found jurisdiction as to each of the offenses charged based upon the commission of key elements of the offenses *in the United States* (Pet. App. 4a-6a).[19] Indeed, petitioner suggests no basis to question the court of appeals' determination that key acts in furtherance of each offense took place in New York.[20] Thus there is no need to follow petitioner through the intricacies of international law; he concedes (Pet. 23) that no jurisdictional question exists where jurisdiction is based upon "commission of the act within the borders of the sovereign."

Petitioner's argument appears to rest on the unarticulated theory that jurisdiction cannot rest upon acts that he caused to be committed in the United States because he was not physically present in the United States (see Pet. 23-25). But petitioner cites no authority for this remarkable premise, and it is plainly unsound. See, e.g., *United States* v. *Columba-Colella*, 604 F.2d 356, 359 (5th Cir. 1979). Because the jurisdiction of the United States to prosecute petitioner rests upon acts he caused to be committed in the

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[19]Petitioner simply ignores the holding of the court of appeals. See, e.g., Pet. 22 n.1, distinguishing *United States* v. *Davis*, 608 F.2d 555, 557 (5th Cir. 1979), on the ground that the case involved acts done inside the United States.

[20]As to the wire fraud counts (see page 2 note 1, *supra*), the court of appeals pointed to telephone and telex communications to and from New York used to arrange chartering of the ship employed in the 1978-1979 transactions, and the transfer of the proceeds of the 1980 fraudulent transaction. As to the transportation counts, the court stressed that the actual transfers of funds had, by petitioner's arrangement, occurred through New York (Pet. App. 4a-6a).

United States, there is no need to consider whether the acts petitioner committed had sufficient detrimental effects upon the United States to supply an independent basis for prosecution under the "objective territorial" principle of international law (see Pet. 24-25).[21] Rather, it is for Congress to decide whether the exploitation of United States channels of commerce and communication for illegal purposes is sufficiently harmful to national interests to warrant prosecution under our laws. *United States* v. *Davis, supra*, 608 F.2d at 557.

Petitioner's assertion (Pet. 21) that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Columba-Colella, supra*, is unfounded. In that case, a British citizen residing in Mexico, agreed to sell a car, stolen in the United States. He was indicted for receiving stolen goods. The defendant had no part in the original theft of the car in the United States; he had simply negotiated in Mexico with the thief to purchase the car. Thus, unlike the present case, in *Columba-Colella* no part of the defendant's crime took place in the United States. Moreover, the Fifth Circuit made clear that if the defendant's intent had included the theft of the car, United States jurisdiction could have been asserted. 604 F.2d at 359. Here, of course, essential elements of petitioner's crime, the use of wires located in the United States to defraud his victims and

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[21]Contrary to the impression that might be garnered from the petition, the court below did not rely upon or discuss this basis for jurisdiction. The quotation from Second Circuit authority found at page 25 of the petition is from another case, *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir. 1968); *Pizzarusso* was not cited in the decision of the court below in this case.

transportation of the proceeds of his fraud in interstate and foreign commerce, occurred within the United States.[22]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
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Attorney

JANUARY 1983

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[22]Because petitioner's prosecution rests upon acts committed in the United States, the "policy considerations" that he adduces against a finding of extraterritorial jurisdiction (Pet. 29-30) are simply irrelevant. In any event, we note the following: (1) the corporation that owned the ships and was defrauded in the 1978-79 transaction had offices in New York (Tr. 137) from which it negotiated the transaction; (2) there is no support in the record for petitioner's claim (Pet. 30) that that corporation or its subsidiary sought to avoid United States laws and that the 1978-79 transaction was deliberately structured to avoid the application of United States law; (3) similarly without support in the record is the claim (*ibid.*) that Britain and Japan, after conducting investigations, concluded that there were inadequate grounds for prosecution.

DOJ-1983-01